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No. 96-1378

IN THE
Supreme Court of the United States
October Term, 1996

DEREK ROCCO BARNABEI,

Petitioner,

vs.

COMMONWEALTH OF VIRGINIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF VIRGINIA

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE ON BEHALF OF THE VIRGINIA COLLEGE OF CRIMINAL DEFENSE ATTORNEYS IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Virginia College of Criminal Defense Attorneys (VCCDA) respectfully moves pursuant to Rule 37.2 for leave to file the attached brief *amicus curiae* in this case. The Petitioner has consented to the filing of a Brief A*micus Curiae* of the Virginia College of Criminal Defense Attorneys. The Commonwealth of Virginia was contacted, but, pursuant to their standard policy, will not consent.

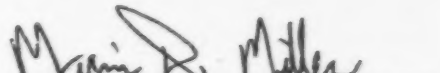
STATEMENT OF INTEREST

The Virginia College of Criminal Defense Attorneys (VCCDA) is a private, nonprofit, statewide organization of Virginia lawyers whose practice is primarily dedicated to the defense of those accused of crime. The organization consists of are private attorneys and public defenders who represent indigent defendants. Our primary purpose is to improve the criminal justice system in the Commonwealth of Virginia by improving the quality of representation provided to criminal defendants.

The VCCDA has been permitted to participate as amicus in litigation in our State on the issue of indigent defense. State appellate courts have also allowed us to participate as amicus curiae in other cases which concern questions of cardinal importance to the fair administration of justice in the criminal law system.

Our interest in this case stems not only from our abiding interest over the distressing lack of funds and resources for the poor who cannot afford to hire a lawyer to defend them in criminal cases in Virginia and elsewhere in the United States, but also from our longstanding concern that it is a violation of due process for someone to be unable to defend themselves simply because they are poor. Our membership regularly represents indigent defendants, which puts us in a unique position for perspective on the issue regarding experts for indigent defendants presented in this case.

Virginia College of Criminal Defense Attorneys, by:



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INTEREST OF AMICUS CURIAE

The Virginia College of Criminal Defense Attorneys (VCCDA) is a statewide organization of Virginia lawyers whose practice is primarily dedicated to the defense of those accused of crime. We are a private, nonprofit membership organization

headquartered in Richmond, Virginia. Our primary purpose is to improve the criminal justice system in the Commonwealth of Virginia by improving the quality of representation provided to criminal defendants. We hold accredited biannual Continuing Legal Education seminars focused on enhancing the skills of the criminal defense practitioner.

Our organization consists of members from both large and small private law firms as well as various public defender offices across the Commonwealth. We have a major interest in the lack of resources for the indigent accused in our State. At present, Virginia is at the bottom of the ladder. We are fiftieth (50th) out of all fifty (50) states in the amount of funding made available for general representation of the indigent.

This case presents an important question regarding fundamental fairness for the indigent accused, not just in Virginia but in the entire Country. The linchpin of this death penalty case was the prosecutor's uncontested expert witness who said that in his subjective opinion there had been forced sexual activity. (5 Tr. 1720-24; 1726-29; 1804-5, 1826-33). Counsel for the indigent accused was not allowed to consult with a defense expert to prepare cross examination or for a contrary opinion on this subject.

On the face of it, this case presents the quintessential Catch-22. A poor person, such as this defendant, cannot have an expert they need to defend their case unless they already have an expert who can tell the court how that expertise will help defend the case. The criminal defense lawyers of Virginia, through the Virginia College of Criminal Defense Attorneys, have a significant interest in this aspect of an accused's right to a full and effective defense. We bring a unique perspective to this case because so many of our numbers represent the indigent.

SUMMARY OF ARGUMENT

This Court should grant a Writ of Certiorari in this case to quell the confusion and disparate decisions on this fundamental issue in the wake of this Court's decision in *Ake v. Oklahoma*, 470 U.S. 68 (1985). *Ake* should not be limited merely to psychiatric medicine, but should include other fields of medicine such as forensic pathology which have subjective aspects similar to psychiatry. Psychiatry is not the only area of medicine and science which involves subjective evaluation of observed and learned facts. Furthermore, in various states and federal circuits where the prosecution rests a significant part of their case on the testimony of an expert in a given field, the defense is entitled to consult with their own expert to determine whether an expert can assist in the preparation of effective cross examination on this area of expertise and whether or not it is proper to have a countervailing expert offer their opinion. When dealing with areas of expertise one is dealing, per force, with subjects that are above and beyond the average lay person's, even a lawyer's, knowledge. It takes someone with expertise in a specialized field, such as psychiatry or forensic pathology, to explain how such expertise can be significant to the defense in a criminal case. Indeed, when an area of expertise is key to a case, lawyers without expertise in that area can be ineffective for failure to explore how such expertise can help them defend their client. They should not need to have an expert to establish the need for an expert. This Catch-22 creates an insurmountable burden and should be laid to rest. This case presents an excellent opportunity for the Court to clarify this issue.

ARGUMENT

The Virginia College of Criminal Defense Attorneys is deeply concerned about the inequities and unfairness inherent in the way many jurisdictions, Virginia chief among them, deny

poor people a fair chance to defend themselves. Since this Court's decision in *Ake v. Oklahoma*, 470 U.S. 68 (1985), it has become quite common for indigents to have psychiatrists appointed in insanity cases and other cases in which the defendant's mental status is a relevant issue. Unfortunately, many courts have turned the obligation of an accused to make a preliminary showing of the need for an expert, as pronounced in *Ake*, into an insurmountable hurdle. In *Husske v. Commonwealth*, 476 S.E.2d 920 (Va. 1990), for example, the central issue in the case focused on DNA testing. At the time, there was a great deal of scientific controversy swirling around the validity of DNA testing. The defense attorney provided the court with a number of affidavits in support of his request for a court appointed DNA expert. The affidavits were from defense attorneys who had been involved in criminal cases in which an expert on DNA was important to the defense because of the centrality of DNA testing to the case. The Supreme Court of Virginia ruled that the affidavits were inadequate. Essentially, *Husske* held that the defense needed an expert to establish the need for the court to appoint an expert. *Husske*, *supra.*

Ake needs clarification in this case just as *Brady v. Maryland*, 273 U.S. 83 (1963), needed further clarification in *United States v. Bagley*, 473 U.S. 667 (1985). *Brady* made it clear that an accused is entitled to have the government disclose exculpatory evidence because to deny such evidence to an accused in a criminal trial constitutes constitutional error and deprives the defendant of a fair trial. *Bagley* made it quite clear that exculpatory evidence includes evidence which impeaches prosecution witnesses. Obviously, if there is evidence which could lead the jury to disbelieve the prosecution's witnesses, then that is as exculpatory as proof that someone else perpetrated the crime. Many courts, after *Brady*, and before *Bagley*, did not include impeachment evidence in their definitions of exculpatory evidence. *Ake* needs the same sort of

clarification now as *Bagley* provided to *Brady*.

Ake recognized that when the mental condition of an accused is relevant to his criminal culpability or to punishment, then the assistance of a psychiatrist may well be crucial to the ability of the accused to martial his defense. This Court recognized that psychiatric medicine played a pivotal role in many cases throughout the Country. Psychiatrists gather information from tests and other sources, analyze it, draw plausible conclusions based on these facts and their medical training and assist the jury in understanding important facts in the case. There is both an objective and a subjective aspect to psychiatric medicine and it is unfair, as *Ake* recognized, for only the prosecutor to have the availability of expertise for presenting their position to the jury. *Ake*, 470 U.S. at 79-84. Regardless of the financial status of a defendant, when issues that involve subjective determinations by experts, such as mental health or forensic pathology, are pivotal in a criminal case, the defense has to be armed with its own expert to insure that the trial is fair.

Forensic pathology is even more prevalent in criminal trials than psychiatric medicine. There is no doubt that it, like psychiatric medicine, often involves a subjective analysis and conclusion drawn from observed and gathered facts. In this case, for example, the state's forensic pathologist, give two essentially subjective opinions which were the linchpin of the prosecution's case. First he said that the physical evidence led him to the opinion that there was the use of force. Next he said that these conditions were not normal and were likely to have occurred during what, in his subjective opinion, was not normal sexual intercourse. (5 Tr. 1720-24; 1726-29; 1804-5, 1826-33). The defense could not attack the subjective conclusion through effective cross examination based on expert analysis or a countervailing expert opinion. Even though it is undisputed that there is no clear-cut, consistent medical viewpoint on the

conclusions to be drawn from the facts present in this particular case, the jury only heard one side.

There is no dispute that there was evidence in this case of prior consensual intercourse between the defendant and the victim and that this sexual activity included anal intercourse. There are some medical experts who may well have testified that the evidence on which the prosecution's expert relied would not support his conclusion. There are expert treatises which an expert for the defense could have explained to defense counsel for use in effective cross examination. In the medical field, for example, there are many terms used in medical texts and treatises which are only understood by persons with medical training, skill and education. A lay person, even a lawyer, may have no understanding as to the meaning and significance of these technical terms. A defense lawyer without the assistance of an expert in such circumstances is at a hopeless disadvantage. More importantly, the indigent client without the money to hire such an expert is severely hampered in the ability to prepare and present the defense side of the case.

As this Court recognized in *Ake*, numerous state statutes guarantee expert services which are necessary for an adequate defense in a manner similar to the Criminal Justice Act, 18 U.S.C. § 3006A. The issue now is how the accused shows entitlement to such assistance in cases that do not involve psychiatry. In North Carolina, an accused is entitled to an expert to help assess and attack a prosecutor's expert on a key issue in a case even if it is not a psychiatrist. *See State v. Bridges*, 385 S.E.2d 337 (N.C. 1989). Similarly, in Mississippi, when, as here, the state uses an expert to present the main evidence on a crucial element of a case, the defense is entitled to their own expert to evaluate, assess and defend against the state's position. *See Harrison v. State*, 635 So. 2d 894 (Miss. 1994). The United States Court of Appeals for the Fourth Circuit has held that an indigent who needs an expert on a

crucial issue in a case is not required to prove what the expert would say in order to obtain the expert. *Williams v. Martin*, 618 F.2d 1021 (4th Cir. 1980). Virginia, and other states, in contrast, essentially require an indigent defendant to have an expert in order to prove the need for an expert. *See Husske, supra*, and the decision below in *Barnabei v. Commonwealth*, 477 S.E.2d 270 (Va. 1996). This disparity should be resolved.

There is another, equally compelling reason for granting a Writ of Certiorari in this case and clarifying the circumstances in which an indigent is entitled to consult with an expert in areas other than psychiatric medicine. When the area of expertise concerns one of the most central issues to be decided in the case, the accused cannot obtain effective assistance of counsel unless, in cases such as the one now pending before this Court, defense counsel is given access to their own expert. In a case such as this, a defense attorney cannot be effective without expert assistance in understanding, analyzing and evaluating the prosecution's expert testimony.

As this Court noted in *Strickland v. Washington*, 466 U.S. 668 (1984), courts should give deference to strategic choices made by defense counsel but, in order for the defense to enjoy this deference, the choices must be made "after thorough investigation of the law and facts relevant to plausible options . . . [because] counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.* at 690-91. Where, as here, counsel for an indigent recognizes the need to investigate a core issue which requires specialized expertise defense counsel does not have, the right of the accused to effective, informed representation is denied unless the courts

make such experts available to indigent defendants. [1]

Particular attention needs to be paid to fairness at the initial trial level these days because of the curtailment of post-conviction review. Recently, the Seventh Circuit in *Hope v. United States*, ___ F.3d ___, 60 Crim. L. Rep. 1494 (7th Cir. 1997), determined that the new habeas corpus provision of the Anti-Terrorism and Effective Death Penalty Act denied a federal prisoner habeas corpus relief focused solely on sentencing issues even if there is new evidence to support the relief. This denial of habeas corpus relief on newly discovered evidence relating to sentencing not only applies to federal prisoners under 28 U.S.C. §2255, but, according the Seventh Circuit, also to state prisoners under 28 U.S.C. § 2254. *Id.* Thus, if through some largess, defendants, such as the one in the instant case, were given free expert assistance after trial and it shattered the legitimacy of the prosecutor's expert's testimony on sentencing issues, that would be of no avail. The expert is needed at trial.

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[1] The problems attendant on the subjective nature of much scientific testimony in criminal cases has been highlighted by the recent problems uncovered in the FBI Lab. The Inspector General report which is due soon has already been released to some defense attorneys in some cases. It reveals questionable laboratory results and improper shading of evidence to favor the prosecution. In West Virginia, a medical examiner, Dr. Zane's, testimony as a forensic pathologist, was found to have been so unreliable that the State Supreme Court looked to appoint a special prosecutor to investigate whether or not he should be indicted. We are not dealing with neutral, objective unassailable evidence in cases such as this and to allow only one side onto the playing field is unfair.

According to the Fifth Circuit in *Blankenship v. Johnson*, ___ F.3d ___, 60 Crim. L. Rep. 1513 (5th Cir. 1997), the Anti-Terrorism and Effective Death Penalty Act's stringent habeas standards do not entitle a state prisoner to assistance of counsel when the prosecutor seeks a discretionary review of an appellate decision overturning his conviction. In many states, such as Virginia, the accused is not entitled to counsel when proceeding on a Writ of Habeas Corpus. *See Howard v. Warden*, 348 S.E. 2d 211 (Va. 1986). The same denial of counsel at habeas also obtains in Mississippi; however, in Mississippi, as noted above, the trial is more fair because they do not deny the defense the right to their own expert on areas which are quintessential to the trial. They do not require use of an expert to obtain the right to an expert.

There is something inherently unfair in allowing only one side to have an expert testify before the jury on a core issue central to the decision in the case. This is especially true in areas such as forensic pathology that involve subjective viewpoints. It is also unfair to give that one side, the prosecution, the right to object to whether or not the defense is allowed to have their own expert help them meet the prosecutor's expert. To give the prosecutor input in the defense right to prepare the defense case is inherently unjust. We are not talking, in this case, about some tangential issue. We are talking about a subject which was considered central because without the forensic pathologist testimony on the issue of rape, this would not be a death penalty case. His testimony should not have been allowed to go unanswered. The defense cannot be expected to cross examine a medical doctor on a specialized area involving subjective judgments when the defense does not have training in that area of expertise. The defense should not be forced to allow the conclusions of the doctor to go unanswered without even so much as an opportunity to consult an expert to determine whether or not there is a countervailing point of view. This Court has to address these issues.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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